In The

Supreme Court of the United States

October Term, 1976

No. 76-1758

PHILIP RASTELLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner Philip Rastelli, respectfully prays that a writ of certiorari issue to review the judgment and opinion entered in this proceeding on March 18, 1977, by the United States Court of Appeals for the Second Circuit. Important constitutional issues are raised in this case which are addressed to the permissible scope of a federal trial judge's discretion in granting continuances balanced against the petitioner's right to adequately prepared counsel.

SUMMARY OF PETITION

The convictions here in issue rest on 15 U.S.C. §1, the Sherman Anti-Trust Act, and 18 U.S.C. §§1951 and 2, commonly known as the Hobbs Act. Section 1 of the Sherman Anti-Trust Act punishes anyone who conspires to restrain trade or commerce among the several states or with foreign nations. Sections 1951 and 2 of the Hobbs Act punishes anyone who affects commerce of the movement of any article or commodity in commerce, through the use of extortion, robbery, or threats of physical violence. Three basic questions arise:

(1) Does constitutional due process outlaw convictions where the defendant's counsel, due to lack of time and the trial judge's refusal to grant a continuance, is unprepared to conduct a vigorous and competent defense that is mandated by the offenses that the petitioner was charged with having committed?

(2) Does an orderly trial calendar outweigh the petitioner's right to a fair trial and to adequately prepared counsel?

(3) Is the trial judge's discretion to be allowed to run unfettered to the point where basic constitutional rights are jeopardized?

OPINIONS BELOW

The opinion of the Second Circuit entered on March 18, 1977 is reprinted in the appendix hereto, p. 1a, *infra*. The denial of a rehearing by the Second Circuit entered on May 10, 1977 is reprinted in the appendix hereto, p. 9a, *infra*.

JURISDICTION

The petitioner was convicted in the United States District Court for the Eastern District of New York on August 27, 1976. Said judgment resulted from a verdict of guilty after a trial by jury before the Honorable Thomas C. Platt. On August 27, 1976, the petitioner was sentenced to one year in prison on Count I for allegedly violating the Sherman Anti-Trust Act (15 U.S.C. §1), and to ten years each on Counts II, V and VII, for alleged violations of the Hobbs Act (18 U.S.C. §§1951 and 2), each to run concurrently. He was additionally fined $1,000 on Count I and $10,000 on each of the remaining counts. The sentence was imposed pursuant to 18 U.S.C. §4205(b)(2).

Thereafter, oral argument having been had on January 17, 1977, the Second Circuit panel of three judges (Lumbard, Feinberg and Mulligan) affirmed the convictions and entered its opinion and judgment on March 18, 1977. See appendix, p. 1a, *infra*. A timely petition for rehearing with a suggestion for a rehearing in banc, was denied by the Second Circuit on May 10, 1977. See appendix, p. 9a, *infra*. This petition for certiorari is being filed within 30 days of that denial of rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

(1) Whether the denial of the petitioner's pre-trial application for a continuance in order to allow his prospective counsel to become familiar with the case and prepare a defense,

appellant from obtaining a fair trial or from obtaining the adequate assistance of counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury, . . . nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; . . . ."

United States Constitution, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

The inherently prejudicial effect of Judge Thomas C. Platt's denial of the petitioner's application for a continuance in order

to allow his prospective counsel to become familiar with the case and prepare a defense, must be examined in light of the complex nature of the facts and the offenses charged.

A. The Indictment

The indictment charged the Workmen's Mobile Lunch Association, Inc. (hereinafter referred to as the Association), Philip Rastelli, Louis Rastelli, Anthony DeStefano, and Carl Gary Petrole, with violations of the Sherman Anti-Trust Act and the Hobbs Act. The indictment contained seven counts and covered a period of over ten years. The indictment, as it pertains to the petitioner Philip Rastelli, accused him of conspiring with Louis Rastelli, Carl Gary Petrole and Anthony DeStefano, to knowingly engage in a combination and conspiracy in unreasonable restraint of trade and commerce. This combination or conspiracy allegedly consisted of an ongoing agreement among the defendants to allocate locations among association members for the sale of food and beverages, and to restrain non-members from soliciting or competing in the sale of food and beverages at locations served by Association members (Count I of Indictment).

According to the indictment, the appellant, Philip Rastelli, was allegedly the power behind the Association, and "at all times was pertinent hereto . . . in control of the Association and responsible for founding, supervising and directing the Activities of the Association."

The indictment further charges, in Count II, that the petitioner along with Louis Rastelli, Carl Gary Petrole, and

Anthony DeStefano did "unlawfully, willfully and knowingly . . . combine, conspire, confederate and agree together with each other . . . to obstruct, delay and affect commerce" as that term is defined in Section 1951 of Title 18, United States Code, and "the movement of articles and commodities in such commerce, by extortion" as that term is defined in Section 1951 of Title 18, United States Code.

The petitioner, in Count III of the indictment, is charged with allegedly conducting the Association's affairs through a pattern of racketeering and extortion by instilling fear in Edward Sadera, Robert Frank, Frank Morgan, David Levy and others, and thereby causing them to abstain from an activity in which they had a lawful right to engage, that is to engage in the business of mobile lunch catering. The third count further alleges that the defendants through harassment and threats of economic harm allegedly coerced certain vending companies into doing business with the Association. Finally the third count alleges that the defendants allegedly endeavored to obstruct justice by urging and advising one William Bruce to give false testimony to a Grand Jury.

Count IV charges the defendants with allegedly attempting to obstruct commerce by extorting one David Levy and obtain his property thereby.

Count V through VII charged the defendants through the use of force or fear, with allegedly causing the mobile truck owners to refrain from dealing with certain commissaries and food suppliers unless and until they paid the defendants certain sums of money.

The petitioner, Philip Rastelli, was named in all and was convicted of Counts I, II, V, VII; petitioner was found not guilty of Count IV; Counts III and IV were dismissed during the trial. Philip Rastelli was sentenced to one year in prison on Count I and to ten years each on Counts II, V and VII to run concurrently. He was additionally fined $1,000 on Count I and $10,000 on each of the remaining counts.

B. The Denial of Continuance

On March 19, 1976, Stephen Willson, Esq. of the firm of Sutter, Moffatt, Yannelli & Zevin, P.C. appeared before Judge Platt with Michael Rosen, Esq. of the firm of Saxe, Bacon & Bolan, P.C. John Joseph Sutter of that firm had been personally retained by and had personally appeared on behalf of Philip Rastelli (Appendix, 38a-40a, 42a-43a). On March 19, 1976, Mr. Willson stated to the court:

> "Our office, and Mr. Sutter, who is currently engaged in a murder trial before Judge Zamenga in County Court, Nassau County, has not given this case the attention it deserves. I feel, perhaps, I am primarily to blame for not bringing to this [sic] Mr. Sutter's attention. Nonetheless, the preparations have been spotty to say the least. I do not blame Mr. Rastelli for desiring to change counsel, and I hope this Court is not prepared to penalize him for what I feel is my office's neglect." (22a).

Indeed it became apparent that neither Mr. Sutter nor his firm had done anything in the preparation of the case. Counsel is advised that Sutter informed co-counsel on four or five occasions that an investigator was working on the matter, but this produced no reports or information from Sutter to Rastelli's trial counsel. Indeed, Sutter advised Rastelli that he would be ready for trial, but this was not to be.

Judge Platt, in response to Mr. Willson's admission, stated that the case was going to trial on March 29th, with or without counsel, that the engagement was set several months ago, that the court calendar was congested, that to the best of his knowledge, Special Attorney Charles Weintraub had been kept on the government payroll solely as a result of this case, and that Sutter knew about the trial date (22a-23a). He concluded his rejection of Rastelli's rights by stating:

> "Mr. Justice Clarke of the United States Supreme Court, when I saw him a year and a half ago in Washington, when I was sent down after I had been appointed to the bench, said to me, at that time, 'Judge Platt, one of those things you are going to find when you get to Brooklyn is that every time you set a case for trial and give the attorneys a firm date, one week before the trial date you are going to get at least one application from another attorney who is going to walk in and say I want to have a substitution, and we want an adjournment as a result thereof.' That is to say, you may have that substitution, but you're going to trial." (23a-24a).

It is respectfully submitted that none of these reasons, as put forth by Judge Platt, was sufficient to justify a denial of the continuance. Judge Platt went on to state that Mr. Sutter was responsible, that Saxe, Bacon & Bolan, P.C. did not have to take the case, that the petitioner's rights were not being suffered in that everyone had requested a March 29th date and that Rastelli had retained counsel (22a-24a), and even attempted to lay the blame upon the United States Congress:

> "You don't understand what I am saying. We are two judges short in this court. We have been waiting for a year and a half for a replacement for Judge Travia who resigned in November a year and a half ago. Congress for five years has promised us an additional judge. That bill is still bottled up until elections in the fall of 1976." (33a).

Apparently, Judge Platt cared not one iota whether or not Rastelli would be represented by adequately prepared counsel or whether Rastelli wished to obtain such representation. He elected to base his decision on off-the-cuff remarks by Justice Clarke and a much too serious concern for judicial economy and speed. We submit that such considerations are necessary, but when a defendant is faced with a complex trial involving alleged violations of the Hobbs Act and the Sherman Anti-Trust Act covering a ten year period, he should not be forced to go to trial with an attorney who has made no investigation, filed no motions or done anything in the way of assuring the defendant of a fair and proper trial with adequately prepared and available counsel.

It is the petitioner's position that the reasons given for a continuance more than adequately justified the granting of such application. The firm of Saxe, Bacon & Bolan, P.C., had only been contacted within days of the March 19th conference (23a). Mr. Rosen pointed out that it was a question of Rastelli's rights (24a), that he did not believe that Judge Platt would let a man go to trial without adequately prepared counsel (24a), and that Mr. Rastelli's incarceration on a state conviction and his physical condition prevented even the petitioner himself from aiding counsel in the preparation of his case (28a).

Obviously, on March 19th, Rastelli justifiably had no faith in his counsel, who was neither available for trial nor even prepared to go ahead if he could be present. While it might be said that Rastelli could have better represented himself, this is not the answer to a case of such complexity that it produced twenty government witnesses, 2,000 pages of trial transcript, and possible incarceration for the rest of his life. When this is coupled with his incarceration and his debilitating physical condition, the need for newly engaged and prepared counsel became mandatory.

REASONS FOR GRANTING THE WRIT

The constitutional issue that arises in this case is one of major importance. It is the question of where the dividing line is to be drawn between two legal principles, the first being that the granting of a continuance is a matter within the sound discretion of the trial judge. This is necessary in order to aid in the efficient administration of justice.

Clashing with the above principle is the right of the accused to due process of law, as guaranteed by the Fifth Amendment, and the right to counsel, as guaranteed by the Sixth Amendment. If the accused is to have the right to counsel, then the necessary corollary to that right is to have counsel that is adequately prepared to go forward with a defense to the charges as found in the indictment. For if the accused is forced to proceed to trial without adequately prepared counsel, then, in effect, he is being stripped of his right to counsel as guaranteed by the Sixth Amendment.

I.

Did the denial of the petitioner's pre-trial application for a continuance in order to allow his prospective counsel to become familiar with the case and prepare a defense, constitute such an abuse of discretion as to preclude the petitioner from obtaining the assistance of counsel for his defense?

It is the petitioner's position that the denial of Rastelli's application for a continuance in order to allow his counsel to become familiar with the case and prepare a defense constituted such an abuse of discretion as to preclude Rastelli from obtaining a fair trial.

The petitioner recognizes that the rule in the Second Circuit is a strict one and that the granting of a continuance is a matter within the sound discretion of the trial judge; that in order to show an abuse of discretion and successfully attack such a denial, a defendant must demonstrate that the judge acted arbitrarily and thus substantially impaired a defendant's rights.

United States v. Ellenbogen, 365 F.2d 982 (2nd Cir. 1966). However, the court in *Ellenbogen,* found that:

> "We recognize, however, that a 'myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' *Ungar v. Sarafite,* 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1954). '. . . There is no mechanical test. Whether there was an abuse of discretion' must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request was denied.' *Ungar v. Sarafite,* supra, at 589, 84 S. Ct. at 850." *United States v. Ellenbogen, supra,* at 985-986.

This is not a case such as *United States ex rel. Baskerville v. Deegan,* 428 F.2d 714 (2nd Cir. 1974) where the defendant's own reason for discharge of his counsel and a request for a continuance was his "dissatisfaction" with his attorney, nor such as *United States v. Abshire,* 471 F.2d 116 (5th Cir. 1972) where second counsel was able to rely on the preparation of first counsel, the latter of whom was actually present during the trial. As the Second Circuit has held:

> "[A defendant] must have the means of presenting his best defense 'and to this means he must have complete confidence in his counsel. Without such confidence a defendant may be better off representing himself." *Maldonado*

> *Denno,* 348 F.2d 12 (2nd Cir. 1965), citing *United States v. Mitchell,* 137 F.2d 1011 (2nd Cir. 1943).

Nor is the situation comparable to that confronting the Court of Appeals for the Fourth Circuit in *Spenak v. United States,* 158 F.2d 594 (4th Cir. 1946), *cert. denied,* 330 U.S. 821, 67 S.C. 777, 91 L. Ed. 1272, where it was said:

> "Appellants had in fact more than a year to get ready; and the record amply supports the view, taken by the judge below in denying further continuance, that they were merely trifling with the court."

Obviously, as stated before, on March 19, Rastelli justifiably had no faith in his counsel, who had failed to adequately prepare the case for trial. It is also apparent that the petitioner was not trifling with the court. Out of necessity, Rastelli rejected any further representation by Sutter. It was Rastell's realization of the seriousness of the charge and of his need for experienced counsel that prompted his decision. He did so, after it became apparent that Sutter had failed to do virtually anything in preparation for trial. Even the government attorneys realized the seriousness of the predicament when Mr. Weintraub candidly advised the court that:

> "The government has considered the situation as to Philip Rastelli. Yet, quite frankly, *we are somewhat concerned about the situation.* We have concluded that we had consented to the severance of Louis Rastelli. That should shorten

> this trial, Your Honor, by about a third. Instead of the anticipated six weeks in direct, I think it is fair to say the direct will be concluded in four weeks. Because of that, and *because even the appearance that Mr. Rastelli may not have adequate representation, based on his current counsel's admission to Your Honor that he has not prepared the government would consent to a one week adjournment."* (30a-31a).

The court replied:

> "The government has no say in this matter." (31a).

It is evident that all parties attempted to accommodate the court and delay the trial for the shortest reasonable time. The government agreed to one week after Mr. Rosen had requested thirty days (28a). After the government's acquiescence, Rastelli's potential counsel would have even accepted this insufficient hiatus and pointed out the time the court would save by Louis Rastelli's severance (32a-33a). Judge Platt's position remained the same and in fact he dared this court to disturb his ruling:

> "The answer is no, and I direct you to order this record and to take it to the Court of Appeals if they mandamus me." (33a-34a).

Indeed, Judge Platt had previously directed such an approach when he all but dared this court to order a continuance:

> "You can mandamus me to the Court of Appeals, and if they say under these circumstances that I must grant a week's adjournment, then it is on their bounds to foul up my calendar, and every other calendar in this court for the rest of the Spring, and if they want to interfere with the District Court's calendar, God bless them." (31a).

Rastelli took Judge Platt's suggestion and sought relief from this court, *Rastelli v. Platt,* 534 F.2d 1011 (2nd Cir. 1976), wherein it was pointed out that the continuance was denied:

> ". . . because of an obdurate and unreasoning refusal to grant a one week's continuance in view of an undisputed collapse of defendant's right to counsel with a concession that the fault was totally apart from the defendant himself, and with the government presenting a solution which would result in an actual net saving of a week of Judge Platt's blocked out time in this trial — Judge Platt's throwing down the gauntlet to the Court of Appeals, the President and the Congress at the expense of this hapless defendant, must call for the exercise of this Court's authority, to prevent a manifest injustice both to the defendant and to the government." (19a).

The court, under the authority of *Stans v. Gagliardi,* 485 F.2d 1290 (2nd Cir. 1973), felt constrained to deny the petition for mandamus (12a-14a). However, the court pleaded with Judge Platt

> ". . . that he reconsider the equities, interests and policies underlying his denial of the request for a continuance." (14a).

The court again echoed the sentiments of the *Stans* case wherein it stated:

> "It should scarcely be decisive against defendant's contentions that, as Judge Gagliardi observed, this is his oldest criminal case. Although the judge is to be commended for being abreast of his criminal docket, this success has no bearing on the crucial issue whether defendants can be properly prepared for a trial on September 11."

* * *

> "A postponement of trial for a few weeks would be a small price to pay for stilling complaints, even if they were unjustified, that these defendants had not been given a fair opportunity to prepare their case and for avoiding an issue which will almost certainly continue during the trial and will be presented on appeal if defendants should be convicted." *Stans v. Gagliardi, supra,* at 1291-1292.

As Judge Lumbard said in dissent, at page 1293:

> "Of even more importance than the prompt disposition of a criminal case is the requirement that the trial be a fair one so that justice may be done. This principle is of such importance that it would seriously prejudice public confidence in the administration of justice were these defendants forced to commence trial at a time when they have not had enough time adequately to prepare their defense, for the reasons set out in Judge Friendly's opinion."

Thus, despite requests from all parties, Judge Platt continued in his steadfast refusal to grant a short continuance:

> "I just got word that the Court of Appeals denied the writ, but requested that it be considered under the denial of the request for a continuance, and they conceded that they have no power under Stans v. Gagliardi, to grant the writ.
>
> Gentlemen, for the reasons I have just stated, if this thing had been properly presented to the Court of Appeals, I would think some basis would be merited, but I don't see any basis for the request. I don't think any of these were presented to the Court of Appeals."

This last reference was to Judge Platt's *sua sponte* recitation (41a-43a) as to the alleged history of the case in an attempt to justify his continual refusal. Judge Platt excoriated John F. Lang, Esq. of Saxe, Bacon & Bolan for alleged misstatements to

the court. However, if such errors were committed, this merely serves to underscore the need this firm had to familiarize itself with the case. (Parenthetically although Judge Platt blasted the firm for not advising the court that it did not represent Rastelli in the criminal matter (36a) at page 2 of the petition for writ of mandamus, we pointed out that "[t]o date said firm has not been officially substituted for petitioner's [Rastelli's] prior counsel.")

The court by its unreasonable denial of Rastelli's application for a continuance, thereby violated his constitutional rights. The zeal with which constitutional rights are to be guarded is well illustrated in the case of *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942) where the defendant Glasser had insisted on having his own lawyer represent him alone. The trial court nevertheless appointed such lawyer to represent a co-defendant. In finding that Glasser had his constitutional right violated, the Supreme Court stated, 315 U.S. at 69, 62 S. Ct. at 464, citing from *Tinkle v. United States,* 254 F.2d 23 (8th Cir. 1958):

> "The guarantees of the Bill of Rights are the protecting bulworks against the reach of arbitrary power. Among those guarantees is the right of the accused in a criminal proceeding in a federal court 'to have the assistance of counsel for his defense.' This is one of the safeguards deemed necessary to insure the fundamental human rights of life and liberty, and a federal court cannot constitutionally deprive an accused, whose life and liberty is at stake, of the assistance of counsel."

At 75 and 76 of 315 U.S. and at page 467 of 62 S. Ct., citing from *Tinkle v. United States, supra* at 29. The court stated:

> "To determine the precise decree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. Snyder v. Massachusetts, 291 U.S. 97, 116 [54 S. Ct. 330, 336, 78 L.Ed. 674]; Tumey v. Ohio, 273 U.S. 510, 535 (47 S.Ct. 437, 445, 71 L.Ed. 749); Patton v. United States, 281 U.S. 276, 292 (50 S. Ct. 253, 256, 74 L.Ed. 854). And see McCandless v. United States, 298 U.S. 342, 347 (56 S. Ct. 764, 766, 80 L.Ed. 1205). * * * In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes, do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance."

The trial judge suggested that to grant a continuance would foul up his calendar. This is completely analagous to the case in *Tinkle v. United States, supra,* at 29, where the government claimed that delay would have been costly and disturbing, the court's response to this was as follows:

> "There is no question but that delay would have been expensive, but constitutional rights are not to be measured by the cost of prosecution."

The same must be said of petitioner Rastelli's situation. His constitutional rights must not be measured by the inconvenience to the trial judge's calendar. The paramount right to effective counsel must prevail in this situation.

We submit that the denial of continuance was inherently prejudicial under the circumstances of this case. Rastelli was not a malingering defendant, out on the street — he was already in jail, he had hired a top-notch lawyer who had supposedly hired an investigator, and at the eleventh hour found out there was no investigator and that the lawyer had made no preparation of the case. He immediately went to his present counsel who went to Judge Platt for a reasonable continuance. Judge Platt's response was to punish Rastelli, a conscientious defendant, and thus jeopardize his rights to a fair trial and adequate representation of counsel under the Fifth and Sixth Amendments of the Constitution.

The record clearly shows the need for a continuance was not a defense ploy. The case covered a ten-year period with dozens of witnesses of complex questions of fact and law. The petitioner was effectively denied, by his prior counsel's admitted negligence, of the opportunity to present his case to the court. He was then denied by the trial court, a reasonable time in order for substitute counsel to prepare a defense. Substitute counsel, without adequate time, had no opportunity to interview, investigate and prepare the case for trial. The court thereby effectively deprived the petitioner of his constitutional rights.

CONCLUSION

For these various reasons, certiorari should be granted to review the Second Circuit's opinion and judgment.

Respectfully submitted,

s/ Roy Kulscar
s/ Roy M. Cohn
Attorneys for Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 530, 539, 818—September Term, 1976.

(Argued January 17, 1977 Decided March 18, 1977)

Docket Nos. 76-1350, 76-1408, 76-1410

United States of America,

Plaintiff-Appellee,

-against-

Philip Rastelli, Anthony De Stefano,
and Carl Gary Petrole,

Defendants-Appellants.

Before:

Lumbard, Feinberg and Mulligan,

Circuit Judges.

Appeals from judgments of conviction entered in the United States District Court for the Eastern District of New York, Thomas C. Platt, Jr., *Judge,* for restraining trade in violation of the Sherman Act, 15 U.S.C. §1, for conspiracy to interfere with commerce by extortion, 18 U.S.C. §§1951 and 2, and for interfering with commerce by extortion, 18 U.S.C. §1951.

Affirmed.

Opinion of the United States Court of Appeals for the Second Circuit

Mervyn Hamburg, Attorney, United States Department of Justice, Washington, D.C. (David G. Trager, United States Attorney for the Eastern District of New York, on the brief), *for Plaintiff-Appellee.*

William Sonenshine, Brooklyn, New York (Evseroff & Sonenshine, Brooklyn, New York; Ernest J. Peace, Mineola, New York, on the brief), *for Defendants-Appellants Petrole and De Stefano.*

Roy M. Cohn, New York, New York (Saxe, Bacon & Bolan, New York, New York, John F. Lang, Ronald F. Poepplein, of Counsel), *for Defendant-Appellant Rastelli.*

Mulligan, *Circuit Judge:*

This is an appeal from judgments of conviction entered after an eleven-day jury trial before the Hon. Thomas C. Platt, Jr., in the United States District Court for the Eastern District of New York. Appellants Carl Gary Petrole, Anthony De Stefano and Philip Rastelli were convicted on April 23, 1976 of one count of restraining trade in violation of the Sherman Act, 15 U.S.C. §1, one count of conspiracy to interfere with commerce by extortion, 18 U.S.C. §§1951 and 2, and two counts of interfering with commerce by extortion in violation of the Hobbs Act, 18 U.S.C. §1951. De Stefano was also convicted on an additional count of violating 18 U.S.C. §1951. The judgments of conviction are affirmed.

The appellants' racketeering activities were centered in the mobile lunch truck business. The industry consists of individuals who operate trucks especially designed for dispensing beverages and foods. Most of the operators' sales take place at locations, such as factories, where a large number of workers can be served during work breaks. The drivers develop their routes

Opinion of the United States Court of Appeals for the Second Circuit

independently and when a particular location is considered highly desirable the driver regularly providing the service will often be faced with competition from other lunch trucks. This practice known as "bumping" may lead to a price war between the two mobile food stands. As a result, one of the competitors may relinquish his spot or both may find that they are able to share the stop. The lunch truck operators either supplied themselves or purchased their supplies from commissaries which aggressively competed for their business.

In 1966, largely through the efforts of Petrole, the Workman's Mobile Lunch Association was created and received its corporate charter from the State of New York. Petrole became its president. In its first year there were 48 members who paid an initial membership fee and weekly dues, which started at three dollars per truck, and were later increased to as much as $10. Although at association meetings there was some discussion of such matters as discount purchasing, group insurance, and discounts on charges for repairing the trucks, none of these benefits ever materialized.

Petrole, after serving as president for approximately two years, resigned and was replaced by Louis Rastelli,[1] the nephew of appellant Philip Rastelli. In 1970 De Stefano was elected secretary-treasurer of the association. Philip Rastelli has no formal relationship with the trade group. The government, however, established that he indirectly controlled the association and shared in the proceeds that were extorted from the suppliers of the lunchmen by Petrole and other association officials. The defendants were engaged in classic racketeering activities. Kickbacks, computed as a percentage of the amount of [illegible]

1. The trial of Louis Rastelli, a named co-defendant in the indictment, was severed from that of the appellants by order of Judge Platt on March 29, 1976.

because the relationship between the defendants and their victims was amicable. However, "fear may be present even if confrontations between the victim and the alleged extorter appear friendly." *United States v. DeMet*, 486 F.2d 816, 820 (7th Cir. 1973), cert. denied, 416 U.S. 969 (1974). "The fact that relations between the victims and the extorters were often cordial is not inconsistent with extortion. Knowing that they were at the mercy of the [defendants], it is a fair inference that the victims felt that to save their businesses they had to keep the extorters satisfied." *United States v. Hyde*, 448 F.2d 815, 834 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972).

Since there was evidence to support the jury finding that fear was present and since the court's charge was clear that "the mere voluntary payment of money or delivery of property unaccompanied by any fear of economic loss would not constitute extortion" we find the argument of appellants unpersuasive. Essentially appellants are attempting to reargue the evidence, urging upon us as facts what are basically inferences favorable to the defendants but which were rejected by a properly instructed jury. It is basic that we must view the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942). Under this test appellants must fail. The issue is not whether the defendants actually had the power to select a caterer from whom lunch truck operators would secure their supplies but rather whether the victims were in reasonable fear that the defendants possessed such power and would use it if their demands were not met. *United States v. Emalfarb*, 484 F.2d 787, 789 (7th Cir.), cert. denied, 414 U.S. 1064 (1973); *United States v. Varlack*, 225 F.2d 665, 668 (2d Cir. 1955). The jury could fairly infer that the victims here paid and obeyed the association out of reasonable fear of economic purchases made by association members, were demanded from suppliers. It was understood that failure to make these payments would result in the loss of member

customers. In addition, through persuasive demonstrations of force and implicit threats of violence, appellants convinced unfavored lunch truck operators to cease bumping at lucrative stops and to surrender these profitable locations to operators protected by the appellants.

I

The appellants argue that there was insufficient evidence to sustain their convictions on the Hobbs Act counts. In order to prove such violations the government must establish extortion.[2] The defendants' conduct in this case in intentionally creating in their victims a fear of economic loss if the victims failed to

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2. The Hobbs Act provides in relevant part that:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. §1951.

None of the appellants contest the sufficiency of the evidence sustaining their conviction for the Sherman Act violation.

"kickback" constituted extortion. *United States v. Kramer*, 355 F.2d 891, 897 (7th Cir.), cert. granted in part and remanded for resentence, 384 U.S. 100 (1966); *United States v. Postma*, 242 F.2d 488, 492 (2d Cir.), cert. denied, 354 U.S. 922 (1957). Appellants contend that they did not place the victims in or physical harm. *United States v. Gill*, 490 F.2d 233, 237 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974); *United States v. DeMet*, *supra*, 486 F.2d at 820.

II

Rastelli raises only one point that merits response. He argues that the district court's failure to grant a continuance upon a substitution of counsel representing him was an abuse of its discretion and denied him a fair trial. We find that Judge Platt's refusal was within the wide bounds of a trial judge's discretion. Thus appellant is not entitled to the relief he seeks and his conviction is affirmed.

The facts surrounding Rastelli's request for a continuance are extensively laid out in this circuit's opinion in *In re Sutter*, 543 F.2d 1030 (2d Cir. 1976) and will only be summarized here.[3] Rastelli, shortly after being indicted on March 5, 1975, retained his first counsel, John Sutter. The case was adjourned several

3. *In re Sutter*, 543 F.2d 1030 (2d Cir. 1976), was an appeal by Rastelli's original attorney from an assessment of costs imposed on him by Judge Platt pursuant to Rule 8(b) of the Individual Assignment and Calendar Rules of the United States District Court for the Eastern District of New York. That rule authorizes district judges to "assess reasonable costs directly against counsel whose action has obstructed the effective administration of the court's business." Finding that Mr. Sutter caused a three-day delay in trial, Judge Platt assessed him $1,500. Judge Platt's application of the rule in this case was affirmed. *Id.* at 1038.

times and on January 5, 1976, with the consent of the defense and the government, the court set March 29, 1976 as the trial date. On February 28, Sutter undertook the representation of another client in a state homicide trial that began on March 8, 1976. This state trial which lasted six weeks came into conflict with Rastelli's scheduled trial date. After being informed that counsel for Rastelli might not be ready for the March 29 trial, Judge Platt called a pre-trial conference on March 19. At this conference attended by an associate of Sutter and a representative of the law firm of Saxe, Bacon & Bolan, Judge Platt was requested to allow the substitution of the latter firm which had been retained on March 15 as counsel for Rastelli. The district court stated that it would only agree if new counsel would be prepared to begin the trial on March 29.

A second conference was held on March 24. At this conference, the government joined with the Saxe firm in seeking a one-week adjournment. This request was refused. Two days later Rastelli's new counsel sought a writ of mandamus from this court. The petition was denied on March 29 on the ground that this court lacked the power to entertain the matter. *Rastelli v. Platt*, 534 F.2d 1011 (2d Cir. 1976). This court made an "earnest request" to the trial judge to reconsider his denial of the one-week continuance. Judge Platt postponed the selection of the jury until April 1 and the examination of witnesses did not begin until April 5, the trial date counsel had requested in their mandamus petition. When asked by the trial judge and government counsel if this delay would be sufficient time for preparation, the representative for the Saxe firm stated:

> "We asked for a week and we said we would come in with the week. We will go ahead with the trial as your Honor has suggested, and further than that, I am not complaining about it. I am saying we are going to do it but you keep asking

> me if it is adequate. You know that is a relative word, Judge, and frankly I have not been in the case except for a couple of days and there is quite a bit of preparation that has to be done. But we will come in on Thursday and select a jury and then go ahead with the trial on Monday."

Since in essence the continuance that the Court of Appeals was asked to order was given by Judge Platt,[4] there is no sound basis for appellant's contention that the district court abused its discretion.

Counsel has only made generalized allegations of prejudice and has not shown any specific way in which Rastelli's defense was hampered. In the absence of any particularization of prejudice this court will not find that the denial of the continuance was an abuse of discretion. *United States v. Weathers*, 431 F.2d 1258, 1260 (3d Cir. 1970); *Joseph v. United States*, 321 F.2d 710 (9th Cir. 1963), cert. denied, 375 U.S. 977 (1964); 3 C. Wright, Federal Practice and Procedure §832 (1969). Indeed the record establishes that Rastelli was represented vigorously and competently by his counsel.

Appellants have raised other points but we find them without merit. The judgments of convictions are affirmed.

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4. In his memorandum and order of March 30 imposing a fine on Mr. Sutter, Judge Platt stated, "In the light of the Court of Appeals request and in the interests of the defendant, Philip Rastelli, this Court must grant up to a one week continuance." Slip op. at 7. Defendant Rastelli did receive the one-week continuance as we have indicated.

ORDER DENYING REHEARING DATED MAY 10, 1977

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, one thousand nine hundred and seventy-seven.

Present:

HON. J. EDWARD LUMBARD

HON. WILFRED FEINBERG

HON. WILLIAM H. MULLIGAN,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Philip Rastelli, a/k/a "Rusty", "The Old Man", Louis Rastelli, Anthony De Stefano, a/k/a "Tony", "Deisty", Carl Gary Petrole, Workmen's Mobile Lunch Association Inc.,

Defendants,

Carl Gary Petrole, Anthony DeStefano, Philip Rastelli,

Defendants-Appellants.

Order Denying Rehearing Dated May 10, 1977

76-1350
76-1408
76-1410

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Philip Rastelli,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, one thousand nine hundred and seventy-seven.

United States of America,

Plaintiff-Appellee,

v.

Philip Rastelli, a/k/a "Rusty", "The Old Man", Louis Rastelli, Anthony De Stefano, a/k/a "Tony", "Deisty", Carl Gary Petrole, Workmen's Mobile Lunch Association Inc.,

Defendants,

Carl Gary Petrole, Anthony DeStefano, Philip Rastelli,

Defendants-Appellants.

Order Denying Rehearing Dated May 10, 1977

76-1350
76-1408
76-1410

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Philip Rastelli, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judge Kaufman has not participated in the consideration or decision.

s/ Wilfred Feinberg
WILFRED FEINBERG,
Acting Chief Judge

ORDER DENYING PETITION FOR MANDAMUS DATED MARCH 29, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

(Submitted March 29, 1976 Decided March 29, 1976)

Docket No. 76-3018

Filed
Mar. 29, 1976
A. Daniel Fusaro, Clerk

Philip Rastelli,

Petitioner,

v.

Hon. Thomas C. Platt, United States District Judge for the Eastern District of New York,

Respondent.

Before OAKES and GURFEIN, *Circuit Judges,* and PIERCE, *District Judge.**

PER CURIAM:

A petition for a writ of mandamus has been filed together with a motion for a stay of a criminal trial scheduled to begin this day before the United States District Court for the Eastern District of New York, Thomas C. Platt, Judge. Petitioner was

* Hon. Lawrence W. Pierce of the United States District Court for the Southern District of New York, sitting by designation.

indicted on or about March 5, 1975, for alleged violations of 18 U.S.C. §§ 1951, 1961, 1962(c) and 15 U.S.C. § 1. A trial date of March 29, 1976, was ultimately set and the petition alleges that on or about March 15, 1976, petitioner advised the firm of Saxe, Bacon & Bolan, P.C., that he wished it to undertake his defense, although to date there has been no official substitution for prior counsel. Applications made on March 19, 1976, and again on March 24, 1976, for a one-week continuance for the purposes of new counsel being enabled to familiarize themselves with the case were denied. The denials occurred despite the fact that the Assistant United States Attorney consented to and joined in the application for a continuance.

Under *Stans v. Gagliardi,* 485 F.2d 1290 (2d Cir. 1973), we do not have the power to hear this matter either as an appeal from an interlocutory order or on the within petition for a writ of mandamus; as we said there, the alternative would result in a deluge of applications to the court of appeals "for the postponement of criminal trials, with consequent delay even though few petitions were to be granted." 485 F.2d at 1292.

At the same time, as in the case of *Stans v. Gagliardi, supra,* we can see no reason for the failure to grant the simple one week's continuance requested. The Speedy Trial Rules have important and significant purposes, to be sure. But these must be carefully weighed against a defendant's claim of need for a short delay to permit proper preparation, especially where a substitution of counsel in a case involving possible imprisonment for life is concerned. Beyond that here, evidenced strongly by the United States Attorney's consent to the request for a continuance, is the risk to the public that overruling the defendant's claim may, as we said in *Stans v. Gagliardi, supra,* 485 F.2d at 1291, "undermine a conviction obtained after many weeks of trial."

Order Denying Petition For Mandamus Dated March 29, 1976

We deny the petition for mandamus under the law of this court as above stated, but we do so with the earnest request to the trial judge that he reconsider the equities, interests and policies underlying his denial of the request for a continuance.

Petition denied.

AFFIDAVIT OF THOMAS A. BOLAN DATED MARCH 26, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PHILIP RASTELLI,

Petitioner,

-against-

HONORABLE THOMAS C. PLATT,

Respondent.

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

THOMAS A. BOLAN, being duly sworn, deposes and says:

I am counsel to the firm of Saxe, Bacon & Bolan, P.C., attorneys for defendant Philip Rastelli.

This affidavit is submitted in support of the petition for a writ of mandamus directing Judge Platt to grant the one week continuance in the above-entitled proceeding, to which one week continuance the government has agreed in view of the emergency facts detailed herein. If said continuance is not granted, irreparable damage to both the defendants and the government may occur. This case presents an extraordinary set of facts, which we respectfully urge should properly be dealt with by this Court through the mandamus procedure and in the exercise of its regulatory power over the District Courts. As the trial is scheduled to commence on Monday, March 29, 1976 and the continuance agreed to by the government is only for one week, a

stay is respectfully requested so that this petition will not be academic.

The mandamus route to this Court was specifically invited by Judge Platt, who requested that the minutes below containing his direction be attached, which we are doing as Exhibit A to this petition.

The facts are these. Mr. Rastelli is one of several defendants in a multi-count indictment charging violation of the Sherman Act, the Hobbs Act and 18 U.S.C. §1962. The indictment was returned in March of 1975. Petitioner Rastelli engaged John Sutter, Esq., of Nassau County to try this case. Mr. Sutter represents Mr. Rastelli in another action pending in Suffolk County Court. This case was on the calendar in January, 1976, at which time the government asked for and obtained an adjournment until March 29, 1976, which was a date that was agreed to by all counsel. The government advised that its direct case would take six weeks, and Judge Platt apparently blocked out that period of time for its trial. Approximately two weeks before the trial was to commence, Mr. Rastelli discovered that Mr. Sutter was engaged in another trial and could not try this case, and that furthermore Mr. Sutter's office had done absolutely nothing to prepare the case. Mr. Sutter conceded to Mr. Rastelli that they were totally unprepared and unable to go forward. Mr. Rastelli promptly contacted our firm and on March 19, 1976, Michael Rosen, Esq., one of our partners, appeared before Judge Platt to request a short continuance so that we could give to the case at least the minimum preparation that might make a fair trial for the defendant possible.

At the hearing before Judge Platt, Stephen B. Willson, Esq., of Mr. Sutter's office, appeared before Judge Platt and made the following statement:

> "Our office . . . has not given this case the attention it deserves. I feel, perhaps I am primarily to blame for not bringing to this [sic] Mr. Sutter's attention. Nonetheless, the preparations have been spotty, to say the least. I do not blame Mr. Rastelli for desiring to change counsel, and I hope this Court is not prepared to penalize him for what I feel is my office neglect." (Transcript of March 19, 1976, pp. 3, 4).

Mr. Rosen stated that our firm would accept the engagement and be ready for trial if a short adjournment were granted. Judge Platt flatly refused, citing a statement that he had been told after his appointment to the bench that

> "You are going to find when you get to Brooklyn . . . that every time you set a case for trial . . . one week before the trial you are going to get at least one application from another attorney who is going to walk in and say I want to have a substitution and we want an adjournment as a result thereof." (Transcript of March 24, 1976, pp. 5, 6 — Exhibit A)

Judge Platt flatly denied any kind of a continuance to enable our firm to prepare a defense. Another counsel, Mr. Evseroff, had a problem with an actual engagement before Judge Weinstein, which Judge Platt solved by telling Mr. Evseroff to go back and forth between two courtrooms and do the best he could.

On Wednesday, March 24, 1976, Roy M. Cohn, Esq., of our firm, appeared before Judge Platt, as did the Assistant United States Attorneys who are to try the case. At that time the Prosecutor announced to the Court that the government was disturbed with the counsel situation in view of the admission of

the Sutter office that they had been totally negligent in failing to prepare the case and in being unable to go forward with it. The Prosecutor advised the Court that the government had conceded that it would consent to a severance motion by one of the other defendants which would shorten the trial by about one third — or by two weeks. The Prosecutor continued that with those extra two weeks to work with the government would consent to a one week adjournment in order to enable our firm to come in and represent Mr. Rastelli.

Presented with the government's conclusion that this one week adjournment was called for in view of the extraordinary and undisputed factual situation and the government's having recast the case so as to permit a one week's adjournment and still save an additional week's trial time over the estimate given to the judge — Judge Platt remained immovable. He told the government it had "no say." He kept saying that "Mr. Rastelli at this point wants to change his mind and get another counsel," completely ignoring the fact that Mr. Rastelli did not suddenly decide to change his mind, but had concededly been advised at the 11th hour that his counsel had negligently failed to prepare a case and go forward. Judge Platt invited a mandamus to the Court of Appeals concerning the week's adjournment, stating that "then it is on their bounds [sic] to foul up my calendar, and every other calendar in this court for the rest of the Spring, and if they want to interfere with the District Court's calendar, God bless them."

Judge Platt then went into a diatribe concerning the failure of the Congress to vote an additional judge for the Eastern District because the bill is "bottled up until the elections," and because the President has not named a successor to Judge Travia. After visiting the sins of the President and the Congress on this particularly hapless defendant, Judge Platt concluded: "The answer is no, and I direct you to order this record and to take it to the Court of Appeals if they mandamus me."

This Court, of course, had occasion to deal with this issue in the *Mitchell-Stans* case. The majority recommended that an adjournment be granted, which recommendation was accepted by the trial judge. The facts in this case cast the situation well beyond that in the Mitchell-Stans case and into even beyond the elements relied on by Judge Lumbard in his dissenting opinion, in which he opined that his Court should sustain the right of mandamus and direct an adjournment rather than merely make a recommendation to the court below. This is a situation where because of an obdurate and unreasoning refusal to grant a one week's continuance in view of an undisputed collapse of defendant's right to counsel with a concession that the fault was totally apart from the defendant himself, and with the government presenting a solution which would result in an actual net saving of a week of Judge Platt's blocked out time in this trial — Judge Platt's throwing down the gauntlet to the Court of Appeals, the President and the Congress at the expense of this hapless defendant, must call for the exercise of this Court's authority to prevent a manifest injustice both to the defendant and to the government. Such an injustice can hardly be corrected after a large multi-defendant, multi-count trial, when its solution has been agreed upon by both the government and the defendant and has been placed before the Court at this juncture.

In the case of *Stans v. Gagliardi,* 485 F.2d 1290 at 1291 and 1292 (2nd Cir., 1973), this Court stated, in reference to the policy of said trial in criminal cases that:

> "These considerations must be carefully weighed against a defendant's claim of need for a short delay to permit proper preparation and the risk that overruling such a claim may undermine a conviction obtained after many weeks of trial."

Affidavit of Thomas A. Bolan Dated March 26, 1976

> ". . . a postponement of trial for a few weeks is a small price to pay for stilling complaints, even if they were unjustified, that these defendants had not been given a fair opportunity to prepare their case and for avoiding an issue which will almost certainly continue during the trial and will be presented on appeal if defendants should be convicted."

As Judge Lumbard stated in his dissent in *Stans,*

> "[o]f even more importance than the prompt disposition of a criminal case is the requirement that the trial be a fair one so that justice may be done." *Stans v. Gagliardi,* supra at 1293.

WHEREFORE, it is respectfully prayed that a writ of mandamus issue from this Court directing the respondent to grant a continuance of the trial in the criminal matter until April 5, pending a determination of this petition, and that this Court grant the petitioner such other and further relief as seems just and proper.

s/ Thomas A. Bolan
THOMAS A. BOLAN

Sworn to before me this
26th day of March, 1976
Donald F. Poepplein
Notary Public, State of New York
No. 30-4608069
Qualified in Nassau County
Commission Expires March 30, 1977

EXCERPTS FROM PRE-TRIAL CONFERENCE OF MARCH 19, 1976

[Commencing at p. 3]

"THE COURT: I called this case this afternoon because I got together with Judge Weinstein. I tracked him down in Alburquerque. Judge Weinstein —

MR. BRONSTEIN: Mr. Essaroff.

THE COURT: Mr. Essaroff knew we had this engagement on March 29th. He should have informed him. However, we can work it out so that Mr. Essaroff can start before Judge Weinstein on Wednesday. Mr. Essaroff will be released to pick a jury on March 29th, before this Court in this case and it is not going to be any impediment for this case to proceed. So, that takes care of that question.

MR. BRONSTEIN: There are two other matters that came to the Court's attention since we called for a pre-trial conference. First of all, we understand there is a plan by Mr. Phillip Rastelli to change counsel. Second of all, the other remaining matter will be the physical condition of Louis Rastelli.

THE COURT: Who is for Phillip Rastelli?

MR. WILLSON: My name is Stephen Willson.

THE COURT: Mr. Willson?

MR. WILLSON: That is correct. Our office, and Mr. Sutter, who is currently engaged in a murder trial before Judge Zamenga in County Court, Nassau County, has not given this case the attention it [4] deserves. I feel, perhaps, I am primarily to blame for not bringing to this Mr. Sutter's attention. Nonetheless, the preparations have been spotty, to say the least. I do not blame Mr. Rastelli for desiring to change counsel, and I hope this Court is not prepared to penalize him for what I feel is my office's neglect.

THE COURT: I will not penalize him. If he wishes to change counsel, he can. The case is going on the 29th regardless if he changes counsel.

MR. WILLSON: Further, your Honor, I would like you to consider the medical situation.

THE COURT: One step at a time. Do you understand what I am saying on this particular point? He can take anybody he wishes as new counsel, provided appropriate substitutions are executed, but he does so with the express understanding that we are going to trial on March 29th. This engagement was set several months ago, and I just indicated to Essaroff's attorney it has inconvenienced every other judge in this court, this case. I have been asked by the Chief Judge to take another case that is under a 90-day gun, and the Chief Judge, and every other Judge is recognizing my engagement with this case on March the 29th. The Strike Force has kept Mr. Weintraub on their payroll [5] for this case. It is not going to be adjourned. Mr. Sutter

can fulfill his obligation to his client. If he can't do it, somebody else can come in and try it. If it is not done properly, he is accountable to his client. He has known about this trial date. It is not going to be adjourned.

MR. ROSEN: We have been contacted by Mr. Rastelli several days ago to come in and represent him in this case.

THE COURT: I told you the condition.

MR. ROSEN: I know what was said. I think counsel's candor in Mr. Sutter's office compels your Honor to reconsider.

THE COURT: There is going to be no reconsideration.

MR. ROSEN: If in fact your Honor does allow our firm to represent —

THE COURT: Mr. Justice Clark of the United States Supreme Court, when I saw him a year and a half ago in Washington, when I was sent down there after I had been appointed to the bench, said to me, at that time, 'Judge Platt, one of those things you are going to find when you get to Brooklyn is that every time you set a case for trial and give the attorneys a firm date, one week before the trial date you are going to get [6] at least one application from another attorney who is going to walk in and say I want to have a substitution and we want an adjournment as a result thereof." He said, there's only one way to deal with that problem. That is to say, you may

have that substitution, but you're going to trial. I have found that to be the truth, unfortunately enough. I don't know why it is peculiar to this Court, but attorneys in this metropolitan area must realize that this is the ruling. It is a ruling that is uniform throughout both the Southern and Eastern Districts, and it is not going to be varied in this case.

MR. ROSEN: I appreciate your Honor's position. I would suggest to your Honor that in fact I have no doubt Mr. Sutter's office has —

THE COURT: If they want to confess wrong, that is their problem, but it is not my problem. It is not your problem. You don't have to take the case. They have to try the case. They took the case. They are responsible for it. You do not have to get yourself into this situation.

MR. ROSEN: I'm aware of that. Your Honor, I am trying to speak from the standpoint of Mr. Rastelli's rights.

THE COURT: There is no suffering of his [7] personal rights. This case was adjourned to the March 29th date at everybody's request. This was the date they picked. I didn't pick it.

MR. ROSEN: I am aware of that, Judge, but I don't believe your Honor would even permit for one second a man to go to trial whose counsel is not prepared.

THE COURT: He's got his problems with his counsel. He picked the counsel. This is not a

court-assigned counsel. This is a counsel he picked.

MR. ROSEN: I am aware of that, too. I think, most respectfully, the man's liberty is at stake, and if this attorney represents to us that he has failed in his obligation, he should not be penalized.

THE COURT: They had better get to it between now and the 29th.

MR. WILLSON: Your Honor, in view of the request, I don't understand the importance of this particular case, which is one count of the Sherman Anti-Trust Act, and several counts of the Hobbs Act, must commence on March 29th. If Mr. Rastelli does wish a change of counsel, and we have, as I stated, not adequately prepared for, if he wishes new counsel to come and —

THE COURT: I understand the importance of the case.

[8] MR. WILLSON: I am asking most respectfully — Judge, I don't know why it is so important that it must commence on March 29th to Mr. Rastelli's prejudice.

THE COURT: It is not to Mr. Rastelli's prejudice. This not [sic] a new case. This bears a 75 CR 160. This has been on the calendar for one solid year. Under the new rules enacted by Congress it should have been tried six months ago.

MR. WILLSON: In that regard, Judge, I would like to make it clear why Mr. Rastelli is currently incarcerated and is not on the bail that has been set and posted in this court. He's in jail on the testimony of one man, a former bail bondsman, admitted forger of the County Court judge's signature. That man's case is over four years old. In fact, it was on this morning in Riverhead. That man's trial is the reason for Mr. Rastelli's incarceration now, and while [sic] we can't get his own doctor to perform his operation. That man's indictment is over four years old. There have been over 50 adjournments. It has been adjourned to this morning. It appeared nowhere on the calendar except that the administrative judge's clerk told me that the folder was in the back and would be sent out back somewhere.

THE COURT: This is not Suffolk County.

[9] MR. WILLSON: I am aware, Judge. I am trying to give the background for the problem we are facing here, and why this man can't get the surgery he needs, and why I feel somehow that there is some magic to the name that everybody that everybody [sic] wants to go after Mr. Rastelli. Maybe I'm a bit paranoid, but I know this particular man, and his testimony was allowed to convict him, and is the reason that he is in prison. He is represented by a prestigious law firm in Suffolk County. He was under a perjury and forgery indictment. No motions were ever made, and yet, this witness at the trial swore up and down, he said he made no deal for his testimony either with Mr. Nadjari —

THE COURT: What have I to do with that?

MR. WILLSON: This man is in jail on a writ brought this Court on the Washington case basis. Judgement came down to the Second Circuit.

THE COURT: We're not here to consider that.

MR. WILLSON: I think we ultimately will be when we see why he has not been able to get his surgery, and were it not for this particular thing, I think they are looking for a big name, scalp, to put on their belt in Suffolk County, and perhaps this is the situation here.

THE COURT: This is not the situation here. This [10] case is one of the oldest criminal cases I have got. It's not the oldest criminal case I have. It is going to be tried on March 29th.

MR. WILLSON: This is the feeling I get.

THE COURT: Do you want to look at my calendar? Look at the rest of my calendar. Walk into my chambers, ask the law clerk to look at my calendar. If this isn't one of the oldest cases I have, I will reconsider. I am sure it is.

MR. WILLSON: I would request —

THE COURT: You are not singled out.

MR. WILLSON: I would respectfully request, absent an extreme prejudice to the

Government, that your Honor reconsider and allow new counsel.

THE COURT: I understand the Government has been preparing for this case for some period of time. I am informed that, and I may be incorrectly informed, that the Government has kept Mr. Weintraub on the payroll for the purposes of trying this case. Otherwise, Mr. Weintraub has left the office. He is assigned to try this case. This Court has to try this case. We are not going to make exceptions for the reasons I have indicated to you.

MR. ROSEN: If your Honor please, we would need a reasonable time, of 30 days.

[11] THE COURT: You can work as co-counsel if you wish. You may not impose upon the Court in this fashion.

MR. ROSEN: Perhaps the Court has overlooked the fact that Mr. Rastelli's situation —

THE COURT: The Government will take six weeks to try. If you can't get your thoughts together in six weeks to present any defense, I really don't feel too sorry for you.

Is that right, Mr. Weintraub, it would take six weeks to try?

MR. WEINTRAUB: That's correct, your Honor.

MR. ROSEN: Your Honor didn't let me finish. Mr. Rastelli has been incarcerated, as I understand it, on a State case. I physically saw, and I wish your Honor would perhaps have the stomach to see what I saw is in this man's stomach. This man has been in jail. Perhaps that's why his lawyers cannot prepare its case, and this is not some kind of late-minute merry-go-round to delay a trial. This is well founded and based on the circumstances, with no intention of a delay, per se. This man has a growth coming out of his stomach that is unreal. I don't blame him if he can't communicate too good. He is unintelligible. I have a doctor's report that states it is coming out [12] of the man's stomach. There are substances here, most respectfully, that would warrant my application.

THE COURT: No summations at this time.

MR. BRONSTEIN: Mr. Rosen is addressing himself to a probable reason for judgement based upon medical history. I believe we ought to reserve for the moment. I assumed we were still addressing ourselves to the change of counsel before we get into the medical.

I would like to be heard on that.

MR. WILLSON: I would request that your Honor reconsider.

THE COURT: I am not going to make any changes. Every other case in this court at the moment has been inconvenienced as far as I understand by this case. It is going ahead. I have

relayed to all of the judges that this was a date requested by the defendants, and it was a date firmly fixed several months ago, and I have moved my calendar around, and moved all sorts of other litigants around. If you don't believe that is so, you can ask any of the other people that have appeared in the last few weeks. All have been told that the time for March 29th has been reserved for this case because of this gentleman. This is the date you picked. I am not going to set the world aside for Mr. Rastelli or anybody else. That ends that."

* * *

EXCERPTS FROM PRE-TRIAL CONFERENCE OF MARCH 24, 1976

[Commencing at p. 4]

* * *

". . . half a day there.

MR. EVSEROFF: Judge, I must say, I've never tried two cases at the same time, but I am always willing to learn. But listen, you can only try one at a time, and that is what I have a partner for. Might I know what date this is scheduled for?

THE COURT: Monday.

MR. WEINTRAUB: That is correct. The other problem is a representation of Mr. Philip Rastelli.

THE COURT: I thought I made my position about the appearance.

MR. WEINTRAUB: You did, Your Honor. The government has considered the situation as to Philip Rastelli. Yet, quite frankly, we are somewhat concerned about the situation. We have concluded that we had consented to the severance of Louis Rastelli. That should shorten this trial, Your Honor, by about a third. Instead of the anticipated six weeks in direct, I think it is fair to say the direct will be concluded in four weeks. Because of that, and because even the appearance that Mr. Rastelli may not have adequate representation, based on his current

counsel's admission to your Honor that he has not prepared the government would consent to a one week adjournment.

THE COURT: The government has no say in this [5] matter. The court is not going to grant any adjournment. Mr. Philip Rastelli has had in my book one of the best law firms in Suffolk County. Mr. Sutter is a well-known, and as I understand it, a very competent attorney. I don't for one minute for one minute [sic] believe that Mr. Sutter is not capable of trying this case. Mr. Philip Rastelli, at this point of the game, wishes to substitute counsel, and he does so. If counsel wishes to undertake a representation of this case after its present posture for a year and a couple of months, they do so at this count. There is no danger that I see in this. There was a date set by the parties and their counsel. The trial was set, and everybody said they would be ready. And I have moved everything around in this court, and in several other courts, to have this space available starting March 29th for this trial and I am not going to change. The judges in this court have a very busy schedule. In this case it is not fair. Just because Mr. Rastelli at this point wants to change his mind and get another counsel. I make my position abundantly clear. You can mandamus me to the Court of Appeals, and if they say under these circumstances that I must grant a week's adjournment, then it is on their bounds to foul up my calendar, and every other calendar in this [6] court for the rest of the Spring, and if they want to interfere with the District Court's calendar, God bless them.

MR. COHN: May it please the court. My name is Roy Cohn of the firm of Saxe, Bacon and Bolan. Mr. Rosen was out here the other day. As your Honor has been told, this matter came to us very recently through a friend and client of our firm. I talked to Mr. Rastelli for the first time yesterday. Mr. Rosen has talked to him on a couple of occasions. If there was the usual case for counsel juggling or something that would institute an interference with the court calendar I can fully understand Your Honor's position, but based upon what we know, these weaknesses, lawyers have and clients have in this last minute juggling, once in a while there does come an honest situation.

THE COURT: I am not procuring anyone's honesty at this stage. In such a case where a case has been pending for over a year, just at this point he has to take the consequences.

MR. COHN: That is what I am addressing myself to. We are not talking about one year. We are talking about one week. Mr. Weinberger has told your Honor this morning that by a severance that has been granted, a third of the trial is being cut off. So the termination [7] date for Your Honor's conclusion will be met. In fact, it will be better than your Honor had allowed for, so there is absolutely no adverse effect on the calendar of this court or the administration of justice.

THE COURT: That is why you have no idea what you are talking about.

MR. COHN: I really don't?

THE COURT: Making a statement like that.

MR. COHN: I am sure it is my inexperience and—

THE COURT: It certainly is. It portrays a definite inexperience. You will understand why you are so ignorant. I want to treat you with the utmost courtesy. In this kind of a case, at this juncture, I am not being mean and harsh and arbitrary and unreasonable. I am charged with the responsibility of trying I don't know how many cases in this District, and also with a backlog of civil cases, going back to 1969. Plaintiffs yelling at me that they want some relief, and I can't just return my calendar that day.

MR. COHN: Your Honor, a third of the case before you has now been eliminated, so that your completion date will be way ahead of time.

THE COURT: If your client plead guilty tomorrow it wouldn't alleviate my situation, except by a drop in [8] the bucket. You don't understand what I am saying. We are two judges short in this court. We have been waiting for a year and a half for a replacement for Judge Travia who resigned in November a year and half ago. Congress for 5 years has promised us an additional judge. That bill is still bottled up until elections in the fall of 1976. Judge Neere just collapsed from exhaustion because he couldn't keep the pace any more, and he is in St. Cumberland Hospital, and you are in here saying to me that you want to bottle up my calendar. The answer is no, and I direct you to order this

record and to take it to the Court of Appeals if they mandamus me.

MR. COHN: Your Honor, should your Honor enter a formal order to this as a prelude to the mandamus, a judgement on a one-week continuance consented to by the government. But, if your Honor brings this as being a crumbling of justice—

THE COURT: Go ahead.

MR. COHN: (continuing) Should we submit a formal order.

THE COURT: Go ahead.

MR. WEINTRAUB: My office has discussed this with Mr. Trager and it is under consideration whether any summary action should be recommended against [9] Mr. Sutter's office based on the representations made in this court.

THE COURT: Whether I should take any summary action?

MR. WEINTRAUB: Whether you should consider his office, perhaps an order to show cause for contempt or its disciplinary action based on Mr. Sutter's representation here. That is just under consideration, your Honor.

MR. COHN: Fortunetely, [sic] your Honor, we have the situation where I am sure Mr. Sutter must have some excuse or reason. I hope it is a

good one why the prior counsel stands up and says 'We haven't just prepared this case.' And I guess the fairness calls for that a defendant is not pilloried anytime, and whether there is an admission as to whether the fault lies. We would all solve this by a one week adjournment in which a new counsel could come in without being delayed. If this rents a seam in your Honor's plans, I am afraid we have all tried so hard to so something that is going to solve the problem.

THE COURT: I said all I am going to say.

MR. COHN: Thank you, Your Honor.

MR. WEINTRAUB: Thank you."

* * *

EXCERPTS FROM PRE-TRIAL CONFERENCE OF MARCH 29, 1976

[Commencing at p. 3]

"THE CLERK: United States v. Philip Rastelli, Louis Rastelli, Anthony De Stefano and Carol Gary Petrole.

MR. WEINTRAUB: Good morning, your Honor.

MR. LANG: My name is John Lang from the firm of Saxe, Bacon and Bolen. I am not sure at this point whether we represent anyone.

THE COURT: I am not so sure that you do. It didn't occur to your firm that you pointed out to the Court of Appeals that you didn't represent Mr. Rastelli when you took the mandamus pleadings.

MR. LANG: I understand there has been no formal institution. If that is the requirement, of course it hasn't been done, but yesterday, for example, I went down to see Mr. Rastelli at the Federal House of Detention, and again I don't know whether we have representation or what. I know Mr. Wilson was here from the firm of Sutter, Moffatt, Yannelli and Zevin representing Mr. Rastelli.

THE COURT: As far as I know, he still is.

MR. LANG: I am not arguing with you on that.

Excerpts from Pre-Trial Conference of March 29, 1976

THE COURT: I have nothing in my files to show there was a substitution.

MR. LANG: You see —

[4]THE COURT: What are you here for? How can you come in and talk for a formal substitution substituting yourself as counsel? I don't understand this type of practice. Maybe it has changed without my knowing it. It has always been my understanding that a person had to be formally retained and had to file a notice of appearance if you are going to appear for him and talk in court. It hasn't occurred to you that you brought a mandamus with respect to this case to the Court of Appeals, file papers in here made applications, and so forth, and you are still not substituted.

MR. LANG: You know, Judge, we are in this kind of a hiatus where there is a question of the attorney of record who is supposed to be here. Mr. Wilson is here.

MR. WILSON: Mr. Sutter is actually engaged.

THE COURT: I talked to Judge Semanka to find out whether Mr. Sutter was engaged, and I discussed with him a certificate of engagement in this court. When I got Mr. Sutter's affidavit on Friday, I was amazed that such an affidavit should be filed, and there was no reference in that affidavit that he had made application to the Court in that case that he was actually going to be engaged on another trial here, and Judge

Excerpts from Pre-Trial Conference of March 29, 1976

Semanka confirmed the fact that no such application had been made to him and he was totally [5] unaware of it. He said that had he known it, he would have honored the engagement here. Under the circumstances, I don't see that I can honor Mr. Sutter's application.

MR. WILSON: I think everybody had known that the trial would go —

THE COURT: Mr. Wilson, it makes no difference whatsoever. If Mr. Sutter is not going to fulfill his professional responsibility to the various courts in which he appears, I am certainly not going to honor his engagement.

MR. WILSON: Perhaps that is the problem.

THE COURT: If he took too much, then he has to suffer the consequences.

MR. WILSON: Judge, I don't think the 180-day ruling was designed to —

THE COURT: In fairness, you are going to have to try the case.

MR. WILSON: His defendant currently faces a maximum exposure of a lifetime imprisonment.

THE COURT: I say I think you are going to have to try the case.

MR. WILSON: The defendant does not want me to.

MR. PHILIP RASTELLI: I don't retain Mr. Wilson.

THE COURT: You retain a firm.

[6] MR. WILSON: No, sir, your Honor, That is not correct. Mr. Rastelli's agreement —

THE COURT: The only alternative you leave me, Mr. Wilson, is to fine Mr. Sutter.

MR. WILSON: That is the alternative.

THE COURT: You speak for Mr. Sutter, as well. If you want me to fine Mr. Sutter as a result of his contact, I will. The other alternative is for you to go to trial.

MR. WILSON: Judge —

THE COURT: You are ready.

MR. WILSON: Incidentally, Judge, I have the latest doctor's report on Mr. Rastelli pursuant to his examination on the 19th, which I have provided copies to the U.S. Attorney, and to Mr. Lang's firm in regard to the physical condition. Judge, while we are on it, it is interesting to note that I sought a writ of habeas corpus similar to the relief that I sought here in the Supreme Court of New York County. They refused to sign the writ because they said the federal courts had jurisdiction. And so that

currently is in total limbo, but that is the status of that particular matter. I don't see how I can fairly try this case for Mr. Rastelli when he desires me not to try this case. When he desires Mr. Sutter as counsel, who was [7] understood would be his counsel upon trial.

THE COURT: Well, Mr. Wilson, if you are going to take that position and Mr. Sutter is not here, and you are going to refuse to try the case, the alternative would be a fine of $1,000 a day on Mr. Sutter until he appears.

MR. WILSON: Is that without a hearing, Judge?

THE COURT: I don't see I have any alternative. If Mr. Sutter wants to come in and be heard, fine. He is not here.

MR. WILSON: Judge, I would like an opportunity, could you call Judge Semanka to see if he would release him for a period of time?

THE COURT: I did. He said he would not.

MR. WILSON: Judge Semanka would not release him to come in here?

THE COURT: He said he would release him for a two- or three-day trial.

MR. WILSON: Just, your Honor, for discussing the fine of $1,000 a day, regarding this particular matter.

Excerpts from Pre-Trial Conference of March 29, 1976

THE COURT: I didn't discuss the potential fine. I said I would have to discuss.

MR. WILSON:I would like an opportunity, then, Judge, to make contact with Mr. Sutter, if I could, and tell him of the situation in order that he may get [8] permission of Judge Semanka and address the Court on it.

THE COURT: You may.

MR. WILSON: Thank you.

THE COURT: Go ahead and make a telephone call, and we will call it again in a few moments.

MR. NEWMAN: My client is not here yet, Judge.

THE COURT: I thought you just had the corporation to deal with. I thought you were going to sever the case.

MR. BORNSTEIN: I heard from the hospital about ten after nine, and they said that Mr. Louis Rastelli was on the way. I don't know where he is at this point, but certainly he is not in the hospital.

MR. LANG: Your Honor, may I be excused? I just got a call from my office. It is urgent.

MR. NEWMAN: May we leave the presence of the Court, Judge?

Excerpts from Pre-Trial Conference of March 29, 1976

THE COURT: Yes.

(Time noted: 10:30. Recess taken.)

MR. WILSON: I just spoke to Mr. Papa of our office, Judge, He is the businessman who will be writing the $1,000 checks, and he is going over to Judge Semanka's part and see if he can get Mr. Sutter to contact your Honor's chambers.

THE COURT: I don't think it is going to do him [9] any good to contact my chambers. If he wants to come in here —

MR. WILSON: Yes, sir. With regard to speaking to your Honor about getting in here to talk to you about this.

THE COURT: I am here. He can come in at any time. As far as I can see, I assume you are just going to refuse to go ahead. I want to check on the notice of appearance on your firm's stationery. If your firm appeared you may have a problem.

Apparently, John Joseph Sutter appears.

MR. WILSON: I believe the certificate of engagement was issued in the name of John Joseph Sutter.

THE COURT: Regardless of it, it looks like he has got another problem. I think, so that the record is clear, I would like to recite the facts with respect to the record in this case which are quite different from the record that was presented

to the Court of Appeals in the mandamus proceeding. So that the record will be clear as to why the Court is taking the actions it proposes to take. The docket sheet shows that on March 5th a seal of indictment was filed and ordered sealed in this case on March 5 of 1975, and on March 6th, the defendant was produced on a bench warrant, all except for one of the defendants, [10] De Stefano, and the indictment was unsealed, and on March 14th there was another arraignment. In this case the Government filed its notice of readiness on March 18th, and on March 21st I called the case for trial and said that it would go forward in the trial on April 4th of 1975.

On April 2nd I got a telegram from Mr. Sutter's office asking for an adjournment and saying that Mr. Rastelli had just been admitted to the hospital. That was the first application for a last-minute application that was for an adjournment. That is a full year ago.

On April 18th, it was recalled again for a status report.

On May 9th it was recalled again, and Mr. De Stefano was arraigned. On May 23rd there was a hearing held. The case was set down for September 5th for a trial. On that date there was a further request by the defendant for an adjournment to November 7th with the understanding that we would go to trial the following week on November 10th. At that time a further request for an adjournment was made by the defendants for a trial date, and at that date

they wanted the trial was right after the 1st of the year.

I told them I would hold my calendar open. On [11] December 29th, another last-minute motion was made by the defendant, Philip Rastelli, to adjourn, asking for a hearing to determine the physical capacity of Mr. Philip Rastelli to stand trial.

On January 2nd, an adjournment was requested so that additional medicals could be obtained with respect to that hearing, and I signed an order having the U.S. Marshals deliver Philip Rastelli for the purpose of the physical examination, and on that date, if my memory serves me correctly, I asked the defendant on what date they would be ready for trial. All of the defendants picked March 29th.

The Government objected strenuously to that long an adjournment. I gave the defendants an adjournment to this morning with the understanding that everybody would be ready; the medical examinations would be over at that time. Each of the counsel asked me for a certificate of readiness.

My recollection is that I gave them that. I told them to make it known to any court where they were involved that they would be involved here at this court and they all assured me that they would be here and ready on March 29th. Just shortly before that, my chambers began to get rumors of further applications for adjournment, so I asked counsel to appear on

Excerpts from Pre-Trial Conference of March 29, 1976

[12] March 19th, and that was the first I understood Mr. Sutter would be substituted, and that was the first I heard that another counsel wished to come in, and that was the first time I heard of a further request for adjournment.

Now, gentlemen, it was not in any sort of being arbitrary or unreasonable. I recite that history because I think it's completely at variance to what has been presented to the Court of Appeals in the Second Circuit. But those are the facts of this case, and that is the history of this case, and that is the reason why this Court wants to go to trial today."

* * *

EXCERPTS FROM PRE-TRIAL CONFERENCE OF MARCH 30, 1976

[Commencing at p. 20]

* * *

"I am sure we have concurrent jurisdiction between the parts of this court.

THE COURT: Well, I am not going to tell you how to practice law. Certainly if you were confronted with the trial of this case and you had an engagement before Judge Judd I would apprise him of it forthwith, I would not wait until the boom was lowered.

MR. SUTTER: As you have done.

THE COURT: As has happened here.

MR. SUTTER: Judge, I can assure you after yesterday I am going to write letters all the time.

THE COURT: Well, maybe something has been learned.

Let me go back to counsel. Is there anything further you wish to put on the record here?

MR. MOFFAT: Nothing further other than respectfully request that the Court give consideration to adjourning the matter until Thursday so new counsel can be substituted and the trial in Nassau can continue and the matter before this Court can continue.

Excerpts from Pre-Trial Conference of March 30, 1976

THE COURT: Is a representative from the new firm here?

MR. SUTTER: Yes, your Honor.

MR. LANG: I am here, your Honor.

[21] THE COURT: When you left yesterday, as I recall, there was a statement that your firm felt it would be prepared to appear on Thursday and select the jury.

MR. LANG: I said yesterday that we could come in to the case on Thursday, yes.

THE COURT: This is what you felt was adequate time with your preparation?

MR. LANG: I do not want to go that far, I did not say that. I said we would come into the case on Thursday and select the jury and go ahead on Monday.

THE COURT: Is it inconsistent with your request that you made of the Court of Appeals? The Court has requested me to accord you such time as you need up to April 5th to prepare your case. As I indicated a moment ago, if you were listening, I never made the statement that was attributed to me, and I do not know by whom, in the New York Law Journal this morning, that I was going to defy that request. I have no such intention and the reason I ask you the question consistent with your application to the Court of Appeals, are you going to be prepared on Thursday morning?

Excerpts from Pre-Trial Conference of March 30, 1976

MR. LANG: Yes, to select the jury and opening statements, your Honor, yes.

[22] THE COURT: So that would be adequate time for you?

MR. LANG: Judge, the answer is yes for us to come in Thursday and to start the case.

THE COURT: Well, I want to make sure that there is no question about it, that there is going to be no claim you have been short-changed on time.

MR. LANG: If I could get a month I would be delighted.

THE COURT: You did not even apply to the Court for a month, you applied for April 5. My question is, consistent with your application to the Court of Appeals, is Thursday sufficient time?

MR. LANG: Again, Judge, as I understand it from what was said here the other day, if we open or we select a jury on Thursday and opened and it would go over until Monday —

THE COURT: That is right, I will not be sitting on Friday.

MR. LANG: So there is no problem about us coming in on Thursday and selecting a jury and opening and continuing with the trial on Monday.

THE COURT: Indeed, on this Friday I said we had motions and hearings, but I have a judicial conference on Friday that I should attend and I propose to [23] attend. That is the reason for my unavailability this Friday.

All right, with that being the fact on that aspect of the case, I would still go ahead.

MR. WEINTRAUB: Do I take that statement by Mr. Lang, his firm is stating that they will, they feel they have had adequate time to prepare this case to proceed Thursday with the selection of a jury and Monday with evidence?

THE COURT: That is my understanding of what he says.

MR. WEINTRAUB: I just want to be sure.

MR. LANG: What you are doing, if I may say so, your Honor, respectfully, is that everyone seems to be saying we have got adequate time. I will tell you what adequate time would be — it would be a month in a type of case like this. We asked for a week and we said we would come in with the week. We will go ahead with the trial as your Honor has suggested, and further than that, I am not complaining about it. I am saying we are going to do it but you keep asking me if it is adequate. You know that is a relative word, Judge, and frankly I have not been in the case except for a couple of days and there is quite a bit of preparation that has [24] to be done. But we will come in on Thursday and select a jury and then go ahead with the trial on Monday. I do

not see where at this point I can really say anything more than that.

THE COURT: I think what Mr. Weintraub wants to make sure of is that you are not taking this position because this Court is in any way or the Government is in any way forcing you to do so.

I am not defying the request of the Court of Appeals and it was never my intention to do so. Anybody who was here yesterday would have recognized that fact. If you feel from your firm's standpoint, as I told you right from the start, you do not want to come in here until April 5th and commence, that is your decision to make.

Mr. Sutter is counsel of record and he has to take whatever consequences that follow from your decision.

MR. LANG: Judge, respectfully again, I say I think I have made the decision for the firm that we will come in on Thursday and do what we have to do. Why press me on that? I do not quite understand that from anyone.

MR. WEINTRAUB: Excuse me, your Honor, for interrupting. When Mr. Cohen appeared before this [25] Court he indicated that with a week's adjournment his firm would be adequately prepared to start the trial. What we are asking is, does it make a difference to the firm that we are going to start and select a jury on Thursday instead of Monday, which would give him a week as they requested? If that makes

that much of a difference, I would like to know about it now and not find out on Monday.

MR. LANG: It makes no difference. If that is the question, the answer is it makes no difference.

MR. SONENSHINE: Your Honor, may I make a request? It is probably the worst moment in the world to make this request but it is probably the only time I will have to do it. I have a matter in the Southern District of Florida, which should take me down there Thursday. It is a matter of one day, that is all I am asking for.

THE COURT: No.

MR. SONENSHINE: Could we start on Monday?

THE COURT: I am shaking my head negatively and I mean it.

MR. PEACE: May I be heard, briefly? Might we have a conditional adjournment for Monday if we have a Transit strike Thursday? In that case we will get killed in every way. It took me two hours to. . . ."

* * *

[Commencing at p. 39]

"In the light of the Court of Appeals' request and in the interests of the defendant, Philip Rastelli, this Court must grant up to a one-week

continuance. However, since Mr. Sutter's conduct herein has caused a complete disruption of this Court's calendar, has caused the unnecessary adjournment of other cases both before the undersigned and other judges, has inconvenienced the codefendants and their counsel, and has required the unnecessary conventions of a jury panel for this case, this Court felt and feels that it had and has no alternative but to impose, and continue, a fine for each day of delay of the trial in this case caused by such conduct. Accordingly, the Court imposes a fine of $500 a day for each day of such delay, namely, Monday, Tuesday and Wednesday of this week.

So ordered.

MR. SUTTER: Judge, may I have ten days to get a loan and pay the fine?

THE COURT: You certainly may.

MR. SUTTER: Thank you, sir. Am I formally relieved of the case at this point?

THE COURT: I do not believe you are. I predicated it all on Mr. Lang's statement which I assume will be carried forward. I cannot relieve you [40] until you are actually substituted. If Mr. Lang's statements do not prove to be true, Mr. Sutter, of course —

MR. SUTTER: I am sure Mr. Lang would not misrepresent to the Court.

Excerpts from Pre-Trial Conference of March 30, 1976

MR. LANG: I will make a representation to the Court that Saxe, Bacon & Bolan, P.C., will substitute for Mr. Sutter and represent Mr. Philip Rastelli at the trial commencing on Thursday of this week.

THE COURT: Very well.

MR. SUTTER: May I be excused to return to Nassau?

MR. WEINTRAUB: There is one other matter I would like to put on the record before we adjourn this trial.

THE COURT: Does Mr. Sutter have to stay? He has asked to be excused.

MR. WEINTRAUB: No, sir.

THE COURT: You are excused.

MR. WEINTRAUB: There is, your Honor, in the indictment in count five, alleging a substantive Hobbs Act charge. The indictment states, in or about the fall of 1971. We anticipate the proof will be in and about the fall of 1970, your Honor, . . ."

* * *

[Commencing at p. 44]

". . . this point, your Honor.

Excerpts from Pre-Trial Conference of March 30, 1976

THE COURT: At the appropriate time I suggest the defense counsel, at the appropriate time when the evidence, if any, is produced with respect to this particular event, I request you point out to me wherein you claim there is surprise and I will consider it.

MR. SONENSHINE: Of course I do not know what the evidence is they are referring to.

THE COURT: Neither do I.

MR. SONENSHINE: I would object at this time, your Honor, to protect the record for my client and I will object to such amendment.

THE COURT: I will allow the amendment subject to the objection at the time to determine whether it is well taken or not, in light of the fact you have been given this warning.

Mr. Lang, is it your understanding that you personally are going to try this case or Mr. Rosen or somebody else?

MR. LANG: Well, on Thursday Mr. Cohen will be trying this case that I know. After that it will be either myself or Mr. Rosen. He is now engaged and I do not know what his schedule will be. But Mr. Cohen will be here on Thursday for the selection. . . ."

* * *

[Commencing at p. 48]

* * *

"Newman is going to be required to go ahead here at all and other miscellaneous things rather than waste time on Thursday morning.

The Government has just handed me questions for the jurors. I assume none of you defense counsel have similarly prepared questions for the jury.

MR. BORNSTEIN: The proposed voir dire to supplement your Honor's standard questioning—

MR. LANG: Judge, I would like to first have time to look at this; since we are just in this case, to submit any questions may I have tomorrow morning, your Honor?

THE COURT: Yes, I will give you whatever time you feel is necessary. Just bear in mind if you hand them to me on Thursday morning or even on Wednesday late afternoon, since I have an engagement on Wednesday night and I will not be riding the railroad, it might be difficult for me to digest.

MR. LANG: I will try to get it to you tomorrow morning, your Honor.

MR. SONENSHINE: I have not prepared any formal questions and I do not even know I will have to.

THE COURT: You do not have to.

MR. SONENSHINE: What I meant is I do not know that I will have any. If I have they will be rather. . . ."

* * *